In the Supreme Court of the United States

OCTOBER TERM, 1924

JOHN G. MORRISON, JR., ET AL., APPELLANTS,
v.
HUBERT WORK, SECRETARY OF THE INTERIOR; CHARLES H. BURKE, Commissioner of Indian Affairs; WILLIAM SPRY, Commissioner of the General Land Office, et al.
No. 112

APPEAL FROM THE COURT OF APPEALS OF THE DISTRICT OF COLUMBIA

BRIEF FOR APPELLEES

STATEMENT

The appeal in this case is from a judgment of the Court of Appeals of the District of Columbia affirming a decree of the Supreme Court of the District dismissing upon motion of the defendants the amended bill filed by Morrison, by which he sought to vindicate and protect the asserted rights of that class designated as "all the Chippewa Indians in the State of

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Minnesota." Opinion, Court of Appeals, R. 39–43, 290 Fed. 306.

The foundation of the bill was the Act of January 14, 1889, c. 24, 25 Stat. 642, pursuant to which the Chippewas had ceded to the United States title and interest in their reservation lands in Minnesota; the justification of the bill was the alleged violation of the terms and conditions of that Act, by Congress in subsequent legislation, and by the defendants, who are executive officers, in administering the affairs of the Chippewas.

The theory of the bill, in general, is that the "cession act" was a contract which the United States was bound to carry out according to its terms and that Congress was without power to alter those terms or change the conditions.

The Act of January 14, 1889, *supra*, authorized the appointment of Commissioners to negotiate with the different bands of Chippewa Indians in Minnesota for the complete cession of their title to all reservations of those Indians in the state.

It further provided for:

(1) The removal after cession of all the Chippewas, except those on the Red Lake Reservation, to the White Earth Reservation, and for allotments in severalty to them of lands in that reservation. The Red Lake Indians were to be allotted lands on the Red Lake Reservation. Sec. 3.

(2) An examination of the ceded lands by 40-acre tracts, and the classification as "pine lands" of tracts upon which there was standing or growing pine timber; the appraisal and sale of such lands. Secs. 4, 5.

(3) The disposal under the homestead law at $1.25 per acre of the agricultural lands not allotted or reserved. Sec. 6.

(4) The creation out of the proceeds of the disposal of the lands of a permanent fund, to be placed in the Treasury of the United States to the credit of "all the Chippewa Indians in the State of Minnesota," this fund to draw interest at five per cent for fifty years. Sec. 7.

(5) Certain disbursements of the interest accruing on this permanent fund; one of these was that one-fourth should, "under the direction of the Secretary of the Interior, be devoted exclusively to the establishment and maintenance of a system of free schools among said Indians, in their midst and for their benefit." Sec. 7.

The motions to dismiss were predicated upon the absence of interested parties, particularly the United States, the want of equity in the bill, and that the matters were for political and not judicial cognizance.

The first item of complaint, involving the action of the Land Department in recognizing the claim of the State of Minnesota under the Swamp Land grant to a large area of the ceded lands, has been eliminated because of certain subsequent action taken by the United States. Appellants' brief, p. 13.

The next matter concerns the disposal under the homestead law of ceded lands, classified as "agricultural," without exacting the payment of $1.25 per acre, as required by section 6 of the "cession" act of 1889 (Bill, par. 7, R. 19). According to the bill

the Act of May 17, 1900, c. 479, 31 Stat. 179, which the Land Department has construed to be applicable, does not apply to these lands. That act granted a homestead right to settlers upon the agricultural public lands acquired by treaty or agreement from the various Indian tribes. No payment was required except the usual land office fees and it was declared that "all sums of money so released which if not released would belong to any Indian tribe shall be paid to such Indian tribe by the United States." It is alleged that if this act is applicable the payments provided for have not been made by the United States and the Court is asked to restrain the issuance of any further patents until the purchase price of $1.25 per acre therefor has been fully paid.

Another complaint relates to the sale of the "pine lands." Under the original act these lands were to be appraised and sold at public auction; but by a later act (June 27, 1902, c. 1157, 32 Stat. 400) the plan was changed. Instead of disposing of land and timber together in 40-acre lots, provision was made for the sale of the timber separately, and after its removal the land was to be classed as agricultural and disposed of under the homestead law on the same terms as in the original act, namely, $1.25 per acre. The Act of May 23, 1908, c. 193, 35 Stat. 272, §4, made similar provisions as to the sale of such lands after the removal of timber.

It is said that these two acts operate to deprive the Chippewas of their property without just compensation and are therefore unconstitutional. This

is based upon the allegation that the lands are worth, and at public sale would bring, more than $1.25 per acre. Bill, par. 8, R. 20, 21.

Complaint is also made of the inclusion of a large area of land classified as "pine lands" in a national forest. The withdrawal of these lands was authorized by the Act of June 27, 1902, *supra*, and that of May 23, 1908, *supra*, The first of these acts authorized the reservation of 200,000 acres of the pine lands and the withholding from sale of five per cent of the timber thereon. In addition there was reserved from sale or settlement the timber and land on ten sections and also on designated islands and points.

The Act of May 23, 1908, created a national forest comprising these lands. By it the Secretary of the Interior was authorized to reserve ten per cent of the timber on this withdrawn area, except the ten sections and the specially reserved islands and points, as to which he was instructed to sell such of the timber as he deemed advisable. For each acre of such lands so reserved, and not otherwise appropriated, there was to be placed to the credit of the Chippewas' permanent fund, $1.25 and also the value of the timber reserved from sale.

The complaint of the appellant is that the $1.25 per acre for the reserved lands is too little and that they are worth much more, from which it is deduced that these acts are unconstitutional, depriving the Indians of their property without due compensation.

The failure, refusal, and neglect of the Secretary of the Interior to make allotments to the Red Lake Reservation Indians of lands on that reservation, as was stipulated would be done in the Act of 1889, is the next ground of complaint. The appellant does not claim that he or those in whose behalf he assumes to sue are entitled to allotment, but he does desire the Secretary to make allotments because the failure to do so and the keeping of the reservation closed, results in expenditures of the trust funds of all the Chippewa Indians in maintaining an agency and in caring for the Red Lake Indians. Bill, par. 10–a, R. 22, 23.

The validity of the Act of February 20, 1904, c. 161, 33 Stat. 46, 48, is attacked. By that act the Red Lake Indians ceded a portion of their reservation and agreed to remove to a diminished reservation which they should possess independent of all the other Chippewas. The ceded lands were to be sold and the proceeds paid into the Treasury of the United States to the credit of those Indians. It is asserted that this act contravenes the Act of 1889 and passes to the Red Lake Indians land in which the other Chippewas were to have an interest. Bill, par. 10–b, R. 24.

Creation of the Red Lake National Forest out of 700,000 acres of the land of that reservation, by the Act of May 18, 1916, c. 125, 39 Stat. 123, 137, is also the subject of complaint. This act provided that the forest should be administered according to scientific principles of forestry, with a view to producing

successive timber crops. Authority to sell timber of certain kinds was given the Secretary of the Interior, the proceeds to be placed to the credit of the Red Lake Indians. (Bill, par. 10–c, R. 25.) This is likewise alleged to be unconstitutional as depriving the Chippewas of these lands or their proceeds without due process and because contrary to the terms of the 1889 act.

Another paragraph of the bill (11–a, R. 26–28) challenges the validity of the action of the Secretary of the Interior in expending interest money from the Chippewa trust fund for the support and education of Chippewa Indian children at sectarian schools. This is asserted to be in violation of paragraph 7 of the session act of 1889 which provided that one-fourth of the interest should be "devoted exclusively to the establishment and maintenance of a system of free schools among the Indians."

Complaint is made of the Act of May 24, 1922, c. 199, 42 Stat. 552, 569, so far as it authorized the payment by the Secretary of the Interior of $46,570, or as much as might be necessary, from the permanent trust funds of the Chippewas for the tuition of Chippewas in the public schools of Minnesota. (Bill, par. 11–b, R. 28, 29.) This is said to be a pure gratuity, as the public schools are a part of the free public school system of the State and the Indian children are entitled to admission to these schools. This appropriation is also said to be in violation of the terms of the cession act and therefore unconstitutional.

Attack is made upon the constitutionality of the Act of March 3, 1921, c. 119, 41 Stat. 1225, 1235, authorizing the Secretary of the Interior to withdraw $100,000 of the trust funds of the Chippewas for use in promoting civilization and self-support among those Indians and providing that $45,000 of that sum might be used for general agency purposes at the White Earth, Red Lake and Leech Lake Agencies. Bill, par. 12–a, R. 29, 30.

It is alleged that like appropriations have been made for similar purposes since 1911, although prior thereto the agency expenses were paid from general appropriations, and that this change in policy is prejudicial to the Chippewas and contrary to the provisions of section 7 of the Act of 1889.

The final item is the proposed removal of the White Earth Agency to Cass Lake, which it is asserted will be poor administration and will entail the expenditure of $25,000 from the Chippewa fund. Bill, par. 13, R. 31, 32.

ARGUMENT

The plenary power of Congress

The fundamental error in the appellant's position, as we see it, is the contention that the Act of January 14, 1889, the cession act, was a binding contract which the United States was bound to perform on its part without deviation from its precise terms, and which Congress was powerless to change. (Bill, par. 5, R. 18.) This contention is emphasized and reiterated all through the bill, each act of Congress being

asserted to be unconstitutional and resulting in the taking of property without due process and without just compensation. That this is an erroneous view is clear from the many decisions of this Court to the effect that Congress possesses plenary power over the Indians and their tribal property; that agreements made with them are not unchangeable and that Congress may enact such other and different legislation as it may deem to be for the benefit and welfare of its wards. *Stephens* v. *Cherokee Nation*, 174 U. S. 445; *Cherokee Nation* v. *Hitchcock*, 187 U. S. 294; *Lone Wolf* v. *Hitchcock*, 187 U. S. 553; *Tiger* v. *Western Inv. Co.*, 221 U. S. 286; *Gritts* v. *Fisher*, 224 U. S. 640; *Sizemore* v. *Brady*, 235 U. S. 441; *Chase* v. *United States*, 256 U. S. 1.

To avoid the effect of these decisions, appellant argues that while it is true that Congress has plenary power over tribal lands and property of the Indians, yet when the cession took place, the lands ceased to be tribal property because the Indian title was extinguished; that the lands passed to the United States, to be administered strictly in accordance with the terms and conditions of the cession act.

But this is too narrow an application of the decisions.

> In the exercise of its guardian powers over tribal Indians through allotment of lands of their reservation and conversion of surplus lands into tribal funds, Congress is free to adjust its action to meet new and changing conditions so long as no fundamental right

is violated. *United States* v. *Rowell*, 243 U. S. 464.

Now while appellant appears to think this argument good in respect to land, he realizes where the logic of it will lead him as to the permanent trust fund provided for in section 7 of the cession act. So he argues that that fund is not tribal property because each member of the class "all the Chippewa Indians in the State of Minnesota" have a vested individual share in that fund. However, the language of §7 clearly demonstrates that this is not so. The fund is "to be placed in the Treasury of the United States to the credit of all the Chippewa Indians in the State of Minnesota as a permanent fund." Only a portion of the *interest* is to be paid to individuals during the fifty-year period and the division of the *fund* to individuals is not to be made until the expiration of the fifty-year period. Until it was distributed no Indian had a vested right to any portion of the fund which was tribal property over which Congress had plenary power. *Sizemore* v. *Brady*, *supra*.

If this fund is not tribal property, then it is difficult to conceive how any property could be so classed.

The United States a necessary party

The argument of appellant leads him into more difficulty. He admits that the title and interest of the Indians were ceded and passed to the United States and there can be no question that this is correct. The United States is the owner of the undis-

posed-of lands. Hence, as the suit seeks to restrain further disposition of these lands and attacks as invalid the laws enacted by Congress authorizing reservation or sale, it is clear that the suit is in these respects one against the United States, to which it is an indispensable party.

The case of *Naganab* v. *Hitchcock*, 202 U. S. 473, is peculiarly in point. In that case the validity of the Act of June 27, 1902, was assailed so far as it authorized the reservation of the forest lands and the disposal of the timber. The suit had the same basis as the present one, that is, the binding force of the 1889 Act and the lack of power in Congress to deviate from the terms thereof.

This Court said (p. 475):

> It is apparent from the above statement of the allegations of the bill that the defendant Hitchcock, Secretary of the Interior, has no interest in this controversy and that it is in effect a suit against the United States to control the disposition of the lands and for an account of the proceeds of the sales of certain lands conveyed by the Indians to the United States under the act of January 14, 1889. Without considering whether the courts would have power to control the action of the Secretary of the Interior in this matter, or whether the power and authority so to do is purely political and subject to the control of Congress without judicial intervention, as was held in the Court of Appeals, we are of opinion that there is no jurisdiction to entertain this

> case. . . . In this case . . . the legal title to all the tracts of land in question is still in the government, and the United States, the real party in interest herein, has not waived in any manner its immunity, or consented to be sued concerning the lands in question.

It is of interest to note that in that case, the complainant claimed that the proposed action of the Secretary of the Interior under the Act of 1902 would result in a reduction in the amount which would be received if the terms of the original act were complied with—exactly the contention made in the case at bar as to the forest lands and as to the disposal of the pine lands and the agricultural lands.

The appellant makes what seems to be a labored argument to distinguish the instant case from the *Naganab* case. He says that the bill in the *Naganab* case treated the property involved as *tribal* property and assailed the constitutionality of the act only so far as it changed the method of disposing of the *timber* on the "pine lands." This is urged in the face of the positive and direct statement of this Court in the *Naganab* case that the suit "is in effect a suit against the United States to control the disposition of the *lands* and for an account of the proceeds of the sales of certain lands *conveyed by the Indians to the United States.*"

Upon these two propositions we might well rest the defense to the bill of complaint as to practically

all the matters complained of. But *in addition* there are other matters with respect to specific complaints which, we submit, also show that the bill is without equity and cannot be maintained.

The disposal of the agricultural and pine lands

To support his complaint of the disposal of the ceded agricultural lands without exacting the price of $1.25 per acre fixed by the cession act, appellant asserts that the Act of May 17, 1900, under which patents have been and will be issued, as he avers, does not apply to these lands since they are not public lands. Bill, par. 7, R. 19.

We think the language of the Act is a sufficient refutation of that. It applies to "the agricultural public lands, which have already been opened to settlement, acquired prior to the passage of this Act by treaty or agreement from the various Indian tribes." By this language Congress gave its own definition of "public lands" and nothing could be clearer than that lands ceded by Indians were within the purview of the Act. The only change from the terms of the cession act made by this Act, was to relieve the homesteader from paying the $1.25 per acre and to obligate the United States to pay it.

But it is said that the Act cannot apply because these ceded agricultural lands "had not been opened to settlement" at the time of the passage of the Act of May 17, 1900. While this was not alleged in the bill, appellant undertakes to supply this deficiency by quoting from the later Act of 1902, which he

asserts demonstrates that they were not then opened to settlement. But some of these lands, at least, were opened to entry prior to the act. Instructions of the Secretary, dated March 21, 1901, 30 L. D. 540. But even if they were not, the homesteaders were allowed to perfect their entries upon the supposition that no payments would be exacted. It would be a hardship upon them to withhold patents unless they made payments. The interest of the Indians is the $1.25 per acre. What sound basis of complaint have they if the United States pays and not the homesteaders? The real grievance is that the money has not been paid by the United States. In this particular the true purpose of the bill is to compel an accounting by the government, but that cannot be done in a suit to which the United States is not a party—expressly decided in the *Naganab* case.

What has been said regarding the hardship on the homesteaders with reference to the alleged unauthorized disposal of the agricultural lands applies with the same force to the *asserted* unlawful action of the Commissioner of the General Land Office in proposing to patent the cut-over "pine lands," under the homestead law, without the payment of $1.25 per acre required by the Acts of June 27, 1902 and May 23, 1908. (Bill, par. 8, R. 20, 21). If error has occurred (and we do not admit it), the United States and not the homesteaders being responsible for it, should make the payment, but a suit of this character is not the proper one to enforce the claim.

Again, it must be presumed that Congress in changing the method of disposing of "pine land" was acting for the benefit of the Indians. Appellant does not assert that the change was *not* beneficial in so far as the disposal of the *timber* is concerned, but he does claim that the cut over *land* would, if put on public sale, bring much more than $1.25 per acre. But after all it is a question of judgment as to what was the best course to pursue in 1902, and the situation in 1922, when the bill was filed, is not the criterion by which to determine the wisdom of the course adopted by Congress twenty years before.

The Interests of the Red Lake Indians

Although appellant Morrison does not claim to represent the Red Lake Reservation Indians he assumes to act for them in demanding that the Secretary of the Interior proceed to allot to those Indians lands on that reservation. (Bill, par. 10-a, R. 22, 23.) He does not even allege that they desire allotments made to them at this time. As a matter of fact they do not, and they petitioned the Secretary not to allot them. Congress was informed of this. (Hearings before the House Committee on Indian Affairs, 66th Cong., 2nd session.) Before that Committee Mr. Meritt, Assistant Commissioner of Indian Affairs, made this statement (p. 160):

> Now, as to the allotments on the Red Lake Reservation and the reasons why allotments have not been made. There are several reasons why we have not yet made allotments on

> the Red Lake Reservation, the principal reasons being, first, the reservation needs to be drained before the lands are susceptible of cultivation; second, that part of the reservation is covered with very fine pine forests and if we should allot this reservation at this time we would be in a position of being compelled to give some Indians lands that could not be cultivated because they are not drained and, on the other hand, of giving the Red Lake Indians timber allotments that are worth anywhere from $10,000 to $25,000. That would be absolutely unjust to the Red Lake Indians. The Red Lake Indians have petitioned the department not to make allotments to them. It is true that there are a few of the Red Lake Indians who would like to have allotments but we must be governed in this matter by what is best for all of the Red Lake Indians.

There is a further suggestion: Congress has provided a way by which any Indian who has been denied an allotment may test his right to it, and if found entitled to it may compel an allotment. Act of August 15, 1894, c. 290, 28 Stat. 286, 305, as amended by the Act of February 6, 1901, c. 217, 31 Stat. 760. Hence any Red Lake Indian may proceed to secure an allotment and the unsolicited action of Morrison is not necessary or proper. In any event, the Red Lake Indians are entitled to be heard on this question and the Court could not properly proceed without them.

What has been said as to the right of the Red Lake Indians to be heard with respect to allotments is equally applicable with respect to the attack upon the constitutionality of the Act of February 20, 1904, by which those Indians ceded some of their lands and agreed to a diminished reservation which was to be possessed by them independent of all other bands of the Chippewas. (Bill, par. 10–b, R. 24.) It is also applicable to the complaint of the creation of the Red Lake Indian Forest. Bill, par. 10–c, R. 25.

It is significant that while in the matter of seeking to compel allotments Morrison appears to act for the Red Lake Indians, yet in these two other matters he takes a position antagonistic to those Indians. Indeed there is antagonism between the White Earth and the Red Lake Indians. A large majority of the White Earth Indians have lost the lands allotted to them, hence they desire to secure a part of the Red Lake diminished reservation which the Red Lake Indians still possess intact. This but emphasizes the necessity for the presence of the Red Lake Indians in this suit.

The use of tribal funds

Payment of a portion of the interest money accruing on the permanent trust fund, in fulfillment of contracts made by the Commissioner of Indian Affairs for tuition and support of Indian children at sectarian schools, is said to be without authority of law and an injunction is asked to restrain approval

of any warrant for such payment. Bill, par. 11-a, R. 26–28.

We repeat what has already been said as to the power of Congress to control tribal property of Indians, and further call attention to the fact that Congress was apprised of these contracts and did not disapprove or direct a discontinuance. (Hearings before the House Committee on Indian Affairs, 66th Cong., 2nd sess., p. 184.) Moreover, these contracts having been made and tuition and board having been furnished, it would seem that the school authorities are necessary parties and ought to be heard in the matter. The right to use *tribal* moneys for the education of Indians at *sectarian* schools has been upheld. *Quick Bear* v. *Leupp*, 210 U. S. 50.

The foregoing likewise applies to the use of money appropriated by Congress in payment under contracts with the State of Minnesota for tuition of Chippewa Indians in the public schools. That action was specifically authorized for the year 1922 by the Act of May 24, 1922, 42 Stat. 552, in the following words (p. 569):

> The Secretary of the Interior is authorized to withdraw from the Treasury of the United States, in his discretion, the sum of $46,570, or so much thereof as may be necessary, of the principal sum on deposit to the credit of the Chippewa Indians in the State of Minnesota arising under section 7 of the Act of January 14, 1889, and to expend the same for payment of tuition for Chippewa Indian chil-

> dren enrolled in the public schools of the State of Minnesota: *Provided*, That the Secretary of the Interior may make payments therefrom of such amounts as he deems proper and just in aid of public schools of the State of Minnesota which have enrolled Chippewa Indian children therein during the fiscal year 1922, and in excess of the rate of compensation fixed in any existing contracts with public-school districts, where such rate is inadequate.

The validity of the Act of March 3, 1921, 41 Stat. 1225, 1235, is challenged in so far as it assumes to authorize the Secretary of the Interior to use a portion of the principal of the trust funds for agency purposes. Bill, par. 12–a, R. 29, 30.

In *Lane* v. *Morrison*, 246 U. S. 214, this Court's attention was called to the proposed use of tribal funds for promoting civilization and self-support among the Indians, and to the change in policy from the use of public moneys to that of tribal money for that purpose. While the question there presented was whether a joint resolution had authorized the continuance of the appropriation of the preceding year, yet it seemed to be conceded that there was power to so use tribal funds and apparently no one considered there was any basis for challenging that power.

So with respect to the expenditure of money in connection with the proposed removal of the White Earth Agency. (Bill, par. 12-b, R. 31, 32.) The

authority for the removal is contained in §2059, R. S., as follows:

> The President shall, whenever he may judge it expedient, discontinue any Indian Agency, or transfer the same, from the place or tribe designated by law, to such other place or tribe as the public service may require.

In these several matters pertaining to use of tribal funds, appellant's claim of want of power in Congress to authorize the expenditures is met by the well settled principle already alluded to that Congress is vested with plenary power with respect to tribal property of the Indians.

In many of its aspects, the bill seeks to substitute the Court for the Interior Department in the supervision and management of the affairs of the Chippewas. We submit that the Court has not the power to interfere in such matters and we are confident that it has no desire to do so.

CONCLUSION

The judgment of the Court of Appeals was right and should be affirmed.

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